ASTER PROPERTIES SDN BHD

v.

PUSAT TEKNOLOGI DAN PENGURUSAN LANJUTAN SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUIT NO: S6-22-195-2000]
6 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Appeal against - Plaintiff first obtained judgment in default of defence - Senior assistant registrar/judge-in-chambers set aside default judgment on defendant's application/appeal - Plaintiff subsequently obtained summary judgment - Defendant appealed - Whether summary judgment entered in contravention of doctrine of res judicata - Whether defendant raised bona fide triable issues*

CIVIL PROCEDURE: *Res judicata - Summary judgment - Defendant appealling against summary judgment - Judge-in-chambers had earlier set aside judgment in default of defence obtained by plaintiff - Whether plaintiff's subsequent application for summary judgment contravenes doctrine of res judicata - Considerations respecting application for summary judgment, whether different from those respecting application to set aside default judgment - Triable issues*

Pursuant to a tenancy agreement, the plaintiff/landlord sued and obtained judgment in default of defence against the defendant/tenant for arrears of rental amounting to RM540,000. Thereafter, the defendant applied to set aside the default judgment on the grounds that: (i) the High Court had no jurisdiction to hear the matter in view of s. 65(1)(a) of the Subordinate Courts Act 1948; and (ii) the dispute should be referred to arbitration in accordance with cl. 4.5 of the tenancy agreement. The senior assistant registrar ruled that the High Court had the jurisdiction to hear the matter and thus dismissed the defendant's application. On appeal, however, the judge-in-chambers ordered the senior assistant registrar to hear the defendant's application on its merits. The senior assistant registrar then heard and allowed the defendant's application and ordered it to file its statement of defence. The plaintiff then appealed against the order of the senior assistant registrar setting aside the default judgment but the judge-in-chambers dismissed the appeal. Subsequently, the defendant filed its

statement of defence and the plaintiff applied for summary judgment. The deputy registrar allowed the plaintiff's application and the defendant filed the instant appeal. The defendant's principal grounds of appeal were that: (i) the summary judgment was entered in contravention of the doctrine of *res judicata*; and (ii) triable issues had been raised in the defence. It was submitted that, on both occasions, when the senior assistant registrar heard and allowed the defendant's application to set aside the default judgment and when the judge-in-chambers dismissed the plaintiff's ensuing appeal, they must have decided that there were triable issues.

Held (dismissing the appeal):

[1] There were no written grounds of judgment from which it could be inferred that the senior assistant registrar had allowed the defendant's application to set aside the default judgment, and that the judge-in-chambers had dismissed the plaintiff's ensuing appeal, on account of a finding that the defendant had raised triable issues. (p 162 c-e)

[2] The considerations in respect of an application to set aside a default judgment are entirely different from those in respect of an application for summary judgment. A default judgment may be set aside if the defendant can show that it has a defence on the merits; an application for summary judgment may be granted if the plaintiff can show that the defendant has not raised any *bona fide* triable issues. (pp 162 e-h & 163 a-b)

[3] In considering the plaintiff's appeal against the order of the senior assistant registrar setting aside the default judgment, the judge-in-chambers had merely 'considered whether the defendant had raised issues'. His Lordship did not 'go one step further' and determine whether the issues raised were triable, as would be required in an application under O. 14 Rules of the High Court 1980. Consequently, there was no breach of the doctrine of *res judicata*. (*Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 14 (Rep) followed.) (p 163 c-f)

[4] In the instant appeal, a careful consideration of the statement of defence would show that the defendant had failed to raise any *bona fide* triable issues. (p 164 g)

[Defendant's appeal against grant of summary judgment dismissed.]

Case(s) referred to:
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(foll)***
Hartecon JV Sdn Bhd v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14
Subordinate Courts Act 1948, s. 65(1)(a)

For the plaintiff/respondent - AS Lua; M/s Soo Thien Ming & Nashrah
For the defendant/appellant - Ernest Azad; M/s Ernest Azad & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Azmel Maamor J:
This is an appeal by the defendant against the order of the learned deputy registrar allowing the plaintiff's application for a summary judgment under O. 14 of the Rules of the High Court 1980 against the defendant (encl. 26).

The brief facts and the background of this case that led to this application are as follows. By a tenancy dated 27 May 1997 the plaintiff, as the landlord, let out to the defendant two premises known as Block A Unit 1 & 2, Jalan Semantan 1/1, Palm Square, 60000 Kuala Lumpur (the said premises). The tenancy was for a period of three years commencing from 1 June 1997 and expiring on 31 May 2000 with a monthly rental of RM54,000 payable at the beginning of each month. Because the defendant had failed to pay the monthly rentals from the month of May 1999, the plaintiff, through its solicitors, sent a notice dated 22 October 1999 asking the defendant to pay the arrears of rental amounting to RM324,000. There was no response by the defendant. As a result of that the plaintiff filed an action against the defendant on 1 March 2000 claiming for the payment of arrears of rental amounting to RM540,000 together with interest and costs.

Under encl. 4 the plaintiff had successfully obtained judgment in default of defence against the defendant. However the defendant made an application to set aside this default order (encl. 9). The defendant gave three grounds for its application namely:

1. That the High Court had no jurisdiction to hear this matter in the light of the provisions of s. 65(1)(a) of the Subordinate Courts Act 1948.

2. That in accordance of Clause 4.5 of the Tenancy Agreement this dispute should be referred to an arbitrator;

3. That the Defendant was ever ready and willing to refer the dispute to be settled before an arbitrator.

At the hearing of this application on 17 May 2000 the learned senior assistant registrar made a ruling that the High Court had jurisdiction to hear this matter. As such she dismissed the defendant's application with costs. On appeal to the judge in chambers it was ordered that the matter be reverted to the learned senior assistant registrar to hear the application on its merits. At the hearing before the learned senior assistant registrar on 18 December 2000 the defendant's application was allowed. At the same time the defendant was asked to file its statement of defence within two weeks of the date of the order. The subsequent appeal by the plaintiff against the order of the learned senior assistant registrar was dismissed with costs.

Subsequently, after the defendant had filed its statement of defence the plaintiff made an application for a summary judgment under O. 14 of RHC (encl. 26). As mentioned at the beginning of this judgment this application which was heard by the learned deputy registrar, was allowed. It was against this order of the learned deputy registrar that the defendant had filed an appeal.

In contending that the learned deputy registrar had erred in making the said order the defendant raised two main grounds, namely:

(i) That the plaintiff's application for a summary judgment would contravene the doctrine of *res judicata*; and

(ii) That the Defendant had successfully raised triable issues in its Defence.

In arguing that the plaintiff in making the O. 14 application had contravened the doctrine of *res judicata* the defendant contended that at the time when the learned senior assistant registrar heard the merits of the application for setting aside the default order on 18 December 2000 she must have ruled that there were triable issues. Otherwise she would not have allowed the defendant's application. Similarly, at the appeal before the judge in chambers, who dismissed the plaintiff's appeal, the judge must have concluded that there were triable issues. Otherwise the judge would not have dismissed the plaintiff's appeal. Hence it was argued by the defendant that once a judge makes a ruling on any particular issue, he must adhere to it

and should not reopen the same issue. In support of such contention the defendant referred to the case of *Hartecon JV Sdn. Bhd. v. Hartela Contractors Ltd* [1996] 2 MLJ 57, where under the headnotes, it was Held:

> (1) Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was procedural in nature, it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. The decision of the judge overruling the respondent's preliminary objection rendered the point taken as *res judicata*.

In my opinion the circumstances in the *Hartecon* case are distinctly different from those of the instant case and as such the authority of the *Hartecon* case should be distinguished. The reasons are as follows.

Firstly, it was not specifically stated either by the SAR or by the judge that the setting aside of the default order was due to the existence of triable issues raised by the defendant. This is because the SAR had not written her grounds of judgment. Neither did the judge as there was no appeal against the order of the judge. The determination of the judgment of the SAR as well as of the judge becomes very essential due to the fact that in an application for setting aside a default judgment, the principles to be applied are:

> (i) If the Default Judgment was not in conformity with procedure, then it may be set aside *ex debito justitiae*;
>
> (ii) If the Default Judgment is in conformity with procedure, then it may be set aside if the Defendant can show that it has merits in its defence.

On the other hand in an application for a summary judgment the plaintiff must show that the defendant has no *bona fide* defence. In other words the defendant could not raise any triable issues.

Setting aside a default judgment and a summary judgment under O. 14 are two completely different applications. Under the application to set aside the default judgment the defendant had not produced its statement of defence yet. On the other hand as regard the application for summary judgment the consideration whether the defendant has a *bona fide* defence would have to be determined from the content of the statement of defence. It must also be stressed that a judge in considering an application for a summary judgment must adhere to the general principle as stated in the case of *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the Supreme Court held:

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In my opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially on an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

It must be pointed out that at the time when I considered the plaintiff's appeal against the order of the SAR when she subsequently allowed the defendant's application to set aside the default judgment I only considered whether the defendant had raised issues. But I did not "go one step further" as pointed out by the case of *Mohd. Ismail (supra)* when considering an O. 14 application. Furthermore at that time the defendant had not filed its statement of defence yet. However at the time when I gave my consideration in respect of the plaintiff's application for a summary judgment under O. 14 the defendant had already filed its statement of defence. Having considered the content of the statement of defence in conformity with the general principle as enunciated by the *Mohd. Ismail* case including "going one step further" with a view to determine whether the issues raised by the defendants were actually triable issues.

In the circumstances as I have stated above I was of the view that there was no breach of the doctrine of *res judicata* when I decided to proceed to consider the plaintiff's application for a summary judgment under O. 14 of the RHC because in this O. 14 application I proceeded to determine whether the issues raised by the defendant were in fact triable issues. I therefore dismissed the defendant's ground based on *res judicata.*

The defendant's other ground in objecting to the plaintiff's application was based on the merits of the defence. The defendant raised three main issues. In accordance with the general principle as stated in the *Mohd. Ismail* case *(supra)* it would be incumbent upon me to go one step further in order to determine whether those issues were triable.

The 1st issue raised by the defendant was that the tenancy agreement had been terminated on 1 July 1999. This contention was based on a letter dated 1 July 1997 (See exh. DJ2 in encl. 24). Such contention was strenuously disputed by the plaintiff who referred the court to a letter dated 19 November 1999 written by the defendant admitting liability to the plaintiff and at the same time seeking a reduction of the rental from RM54,000 per

month to RM27,000 (See exh. SJV3 in encl. 21A). In the light of the existence of the defendant's letter dated 19 November 1999 which the defendant did not deny, the contention by the defendant that the tenancy had been terminated on 1 July 1997 could not be true. As a matter of fact in para. 5 of the statement of defence the defendant stated that the date of termination of the tenancy was 1 September 1999. I therefore concluded that the 1st issue was not a triable issue.

The 2nd issue raised was that the amount claimed by the plaintiff under the letter of demand differed from the amount claimed in the statement of claim. In the letter of demand the amount that the plaintiff claimed was RM324,000 whereas under the statement of claim the amount was RM540,000. In reply the plaintiff had given a very reasonable explaination in respect of the differing amounts. Under the letter of demand the claim for arrears of rentals was up to the month of October 1999, whereas under the statement of claim the claim was for arrears of rental up to the month of February 2000. With such explaination I was fully satisfied that this 2nd issue was also not a triable issue.

Finally, the defendant alleged that there was a supplementary agreement between the plaintiff and the defendant and the terms of the original tenancy agreement had been varied. However the defendant failed to state the particulars of this supplementary agreement. The plaintiff disputed the existence of such supplementary agreement. The defendant failed to produce a copy of the alleged supplementary in writing. In law, a written agreement can only be lawfully varied by another written agreement provided that all parties to the original agreement have given their consent. Since no written supplementary agreement was produced by the defendant and no consent appeared to have been given by the plaintiff I came to the conclusion that there was no truth in the defendant's allegation.

After having carefully considered the statement of defence as well as the submission by the counsel for the defendant I arrived at the conclusion that the defendant had failed to raise any triable issue. In the whole circumstances of this case and for the reasons as I have stated above I dismissed the defendant's appeal with costs.